

Bath (Migration) [2023] AATA 3561 (25 October 2023)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Arshpreet Singh Bath

CASE NUMBER: 2303332

HOME AFFAIRS REFERENCE(S): BCC2021/1405411

MEMBER: T. Quinn

DATE: 25 October 2023

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 25 October 2023 at 4:15pm

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – bogus documents provided with visa applications – school certificates – departmental investigations – concession that certificates not genuine and genuine certificates provided – inconsistent claim that genuine certificates provided to agent for first application – bogus certificates also provided with second application – different years of completion given in genuine temporary entrant statement – academic progress and father’s death – no compelling or compassionate circumstances to waive requirements – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5(1), 65, 338(2), 347
Migration Regulations 1994 (Cth), Schedule 2, cl 500.217, Schedule 4, criterion 4020(1), (5)

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Kumar v MIBP [2020] FCAFC 16
Mudiyanselage v MIAC [2012] FMCA 887
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42
Vyas v MIMAC [2013] FCCA 1226

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. On 13 July 2021, the applicant applied for a student visa (the visa) to undertake study in Australia ('the application').¹
4. On 7 March 2023, a delegate of the Minister for Home Affairs ('the delegate') refused to grant the application on the basis that the applicant did not satisfy the requirement not to produce a bogus document.²
5. On 9 March 2023, the applicant applied for a review of the delegate's decision with this Tribunal.³
6. The applicant appeared via telephone hearing before the Tribunal on 25 October 2023 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
7. I have proceeded to a decision having regard to all the information before me, including the Department file and all material and evidence provided by the applicant to the Tribunal.
8. It is for the applicant to satisfy the Tribunal that the requirements of the Act and Regulations have been met. A decision maker is not required to make the applicant's case. Whilst the concept of onus of proof does not apply to administrative decision making, the relevant facts of the individual case must be supplied by the applicant, in as much detail as necessary to enable the decision maker to properly consider the case that is being put.
9. For the following reasons, the decision under review is affirmed. In reaching this decision, I have had regard to:
 - a. the evidence given at the hearing;
 - b. all submissions and written material filed by or on behalf of the applicant; and
 - c. other relevant documents on the Tribunal and Department files.
10. Not all the evidence and material that has been placed before the Tribunal has been specifically referred to in my reasons as set out below. The reasons incorporate reference only to that information that I have found to be fundamental or materially significant to the determination of the issues in the case.⁴

11. STATUTORY FRAMEWORK

¹Specifically, a Student (Temporary) (Class TU) visa ('the visa' under section 65 of the *Migration Act 1958* ('the Act'). At the time of application, Class TU contained two subclasses: Subclass 500 (Student) and Subclass 590 (Student Guardian). The applicant applied for the former and does not claim to meet the criteria for a Subclass 590 (Student Guardian) visa.

²See clause 500.217 of Schedule 2 to the Migration Regulations 1994 ('the Regulations' which requires that student visa applicants must satisfy the public interest criterion 4020 ('PIC 4020'). In this case, the delegate found the applicant provided a bogus document within the meaning of section 5(1) of the Act in his application which is the subject of this review. A copy of the delegate's decision was provided to the Tribunal with the applicant's review application

³ Pursuant to sections 338(2) and 347 of the Act.

⁴In this regard, please see *Kumar v Minister for Immigration and Border Protection* [2020] FCAFC 16 (24 February 2020) at [82] and [96].

12. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by clause 500.217 for the grant of the visa. Broadly speaking, this requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
13. Satisfaction of PIC4020, requires the decision maker to find that there is no evidence before it that the applicant has given, or caused to be give a bogus document or information that is false or misleading in a material particular in relation to their visa application or a visa the applicant held in the twelve months before the application was made.⁵
14. 'False or misleading in a material particular' means information that is false or misleading at the time it is given and which is relevant to any of the criteria the decision maker may consider when making its decision, whether or not the decision is made because of that information.⁶ In contrast, a 'bogus document' is a document that the decision maker reasonably suspects is a document that: purports to have been, but was not, issued in respect of the person; or is counterfeit or has been altered by a person without authority to do so; or was obtained because of a false or misleading statement, whether or not made knowingly.⁷ A bogus document, therefore, does not have to be a document that is relevant to the criteria to be considered by a decision maker regarding the grant of the visa.⁸ This aspect of the PIC4020 provisions operates in an attempt to disincentivise visa applicants from providing bogus documents.
15. While PIC4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the decision maker to conclude that the visa applicant was aware the information was purposely untrue in order for PIC4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision.⁹

⁵PIC 4020(1).

⁶PIC 4020(5). See also *Singh v MIAC* [2012] FMCA 145 (Driver FM, 24 April 2012) at [68]; *Kaur v MIBP* [2014] FCCA 1264 (Llyod-jones J, 18 June 2014) at [80]-[81]; *Singh v MIBP* [2018] FCCA 1136 (Manousaridis J, 9 May 2018); and *Khan v Minister for Immigration and Citizenship* [2011] FCA 75 at [28] per Moore J.

⁷Section 5(1) of the Act.

⁸*Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

⁹*Trivedi v MIBP* [2014] FCAFC 42.

16. The requirements of PIC4020(1) and (2) can be waived if there are compelling or compassionate reasons justifying the granting of the visa.¹⁰ However, this waiver does not apply to identity requirements found in PIC4020(2A) and (2B). PIC4020 is extracted in the attachment to this decision.
17. The issues for determination in this case are whether the applicant has given or caused to be given to the Department a bogus document or information that is false or misleading in a material particular and, if so, whether there are compassionate or compelling reasons for this public interest criterion to be waived.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. The applicant in this case is a 25-year-old male Indian citizen.¹¹

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

19. *Background*

20. The delegate's decision sets out the history in this matter which revolves around educational documents, including a class 10 certificate dated March 2015 and a Senior Secondary (grade 12) certificate dated March 2017 filed in support of his application for a student visa which is the subject of this review ('the bogus documents').
21. The Department conducted investigations in September 2021 which indicated the bogus documents were not genuine.
22. On 11 January 2023, the Department sent the applicant a natural justice letter indicating that Department received unfavourable information which may lead to a decision to refuse his application. This letter set out the relevant PIC4020 provisions and referred to the bogus documents provided and explained that Department investigations confirmed the documents were not genuine and therefore bogus documents. This letter invited the applicant to comment on this information considered to be bogus and to specify if he believed there were any compelling or compassionate circumstances (in the terms set out in the PIC4020 provisions).
23. On 8 February 2023, the applicant responded to the natural justice letter ('the February submissions') stating that he had provided genuine educational documents to his agent and that he did not know about the bogus documents until receiving the natural justice letter. He went on to state in the February submissions that his 'agent has mixed up the applications and documents and documents attached are wrong. It is not my fault but the fault of the Agent which he messed up the documents'.
24. The February submissions concede that the educational documents are not genuine, and the applicant has indicated that he completed his grade 10 certificate in 2014 and his grade 12 certificate in 2016 (and filed copies of his genuine certificates in this regard). The names and photo of the applicant on the grade 10 certificates are the same in the bogus document and the new document filed by the applicant in February 2023.

25. *Evidence on the question of 'bogus document'*

26. At all times since the Department's natural justice letter of 11 January 2023, the applicant has conceded the educational documents making up the bogus documents are not genuine.

¹⁰PIC 4020(4).

¹¹See delegate's decision and applicant's application in the Department file.

27. At hearing, I enquired about the Genuine Temporary Entrant statement dated 2 November 2021 ('the GTE') which was written in the first person and had the applicant's name at the base of the letter. I asked the applicant whether he recalled this document and filing same. He gave evidence that he could remember the document but not everything he had written in it. I stated that in the GTE the applicant also stated he had completed grade 10 in 2015 and grade 12 in 2017 which are not the dates reflected in his apparently genuine educational certificate filed in February 2023. The applicant then gave evidence that he gave his agent genuine documents and that his agent applied with fake documents and he was not sure why they had done that. He said he was surprised he got his visa so quickly and was told they had applied using fake documents, that he had had a fight with them and asked why they used fake documents.
28. The applicant gave evidence that he first arrived in Australia in 2018. I asked whether the bogus documents had been filed in support of his application for that student visa and he gave evidence that they had. I asked whether he had re-filed those educational documents (being the bogus documents) in support of his present application which is the subject of this review and he gave evidence that he had because his agent in India had told him if he used any other document the police would catch him, and things would happen to him.
29. I am very troubled by this evidence. Firstly, it is inconsistent with the February 2023 submissions where the applicant stated his agent mixed up the applications and filed the wrong documents. Secondly, I consider the applicant knew he was filing non-genuine documents when making the application which is the subject of this review. I do not consider the applicant's evidence about interactions with his previous agent negate the operation of the law in relation to the PIC4020 provisions of the Act.
30. Further, the applicant refers to completion dates of 2015 and 2017 in the GTE filed with the Department in November 2021. These statements are also clearly untrue on the applicant's own evidence, including his genuine educational certificates dated 2014 and 2016, filed in February 2023.
31. I am very concerned by the evidence before me.
32. The Federal Court has held that it is not necessary for a visa applicant know of, or be directly involved in, any falsehood for PIC 4020 to be engaged.¹² However, an element of fraud or deception is necessary in order to attract the operation of PIC 4020.¹³ In that case, Buchanan J states:
33. it is not necessary... to show knowing complicity by a visa applicant. That would impose an impossible task on those administering the visa system. But it is necessary that the information or document have the necessary quality of purposeful falsity, whether or not the visa applicant can be shown to have knowledge of that fact.¹⁴
34. The applicant filed the bogus documents when he knew they were not genuine. It is not necessary that the applicant created the bogus documents himself. The question is whether he has *given or caused to be given* a bogus document.

¹²*Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42 per Buchanan J (Allsop CJ and Rangiah J agreeing).

¹³*Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42 per Buchanan J (Allsop CJ and Rangiah J agreeing).

¹⁴*Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42 per Buchanan J (Allsop CJ and Rangiah J agreeing) at [43].

35. The test in these cases is a 'reasonable suspicion'. I reasonably suspect that the bogus document (being educational documents filed for the applicant's grade 10 certificate in 2015 and grade 12 certificate in 2017), provided with the applicant's student visa application is counterfeit or has been altered by a person without authority to do so.¹⁵ Even if the applicant were able to successfully convince me (which he has not) that he was not complicit or directly involved in this falsehood, the Federal Court has indicated PIC4020 is still engaged.
36. I find that the applicant has provided a bogus document within the meaning of section 5(1) of the Act.
37. I find that the applicant does not meet PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

38. PIC 4020(2) requires I be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
39. There is no evidence that the applicant has been refused a visa in the relevant period.
40. Therefore, PIC 4020(2) is met.

Should the requirements of PIC 4020(1) or (2) be waived?

41. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in Regulation 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances.¹⁶
42. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied.¹⁷ The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
43. Guidance on circumstances that may amount to compelling or compassionate circumstances may be found in the Explanatory Statement to SLI 2011, No 13 ('ES') which introduced PIC 4020, and the Department's policy guidelines.¹⁸ While not binding, the Tribunal may have regard to the Department's interpretation and examples of what may constitute compelling or compassionate circumstances.¹⁹
44. According to the ES it was intended that the granting of the waiver would relate solely to compelling circumstances affecting Australia's interests, or the compassionate and

¹⁵Section 5(1) of the Act.

¹⁶*Kaur v MIBP* [2017] FCAFC 184.

¹⁷*Plaintiff M64/2015 v MIBP* [2015] HCA 50.

¹⁸Policy – [Sch4 4020] – Public Interest Criterion 4020 – The integrity PIC - Compelling and/or compassionate circumstances (re-issue date 1/1/18).

¹⁹*Mudiyanselage v MIAC* [2012] FMCA 887 where the Court noted it was open for the Tribunal to be guided by Department policy

compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, not the interests of the visa applicant.²⁰ The types of circumstances that may involve compelling or compassionate reasons for waiving the requirements of PIC 4020 identified in the ES include:

- family reasons (for example, unexpected serious or fatal family situations over which the applicant had no control, such as the incapacitation or death of a partner or child or another member of the family unit);
- that family members in Australia would be left without financial or emotional support; and
- a parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and would therefore be subject to an exclusion period).²¹

45. In addition, the Department's guidelines suggest that there may be compelling circumstances affecting the interests of Australia if:

- Australia's trade or business opportunities would be adversely affected were the person not granted the visa (noting that gaining employer sponsorship is not considered sufficient grounds for a waiver); or
- Australia's relationship with a foreign government would be damaged were the person not granted the visa; or
- Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought after in Australia) if the person was not granted the visa.²²

46. Notably, the policy states that compelling circumstances affecting the interests of Australia would not include circumstances where the non-citizen merely claims that, if granted the visa, they would work and pay taxes in Australia, pay fees to an education provider or spend money in Australia.²³

47. The applicant has not filed written submissions on this issue. At hearing, he gave evidence (when asked about the waiver provisions) that he is facing a hard time and implored the Tribunal to allow him to travel to see his mother who is on her own in India. I note the applicant has filed a death certificate for his father who passed away in 2021 during the COVID19 Pandemic. I empathise with the applicant's personal circumstances.

48. I note the applicant has completed a Certificate III in Painting and Decorating and a Diploma of Building and Construction and has provided corroborating certificates in this regard. He gave evidence that he is not presently enrolled but would like to complete an Advanced Diploma of Business.

49. I have carefully considered all of the evidence and material before me. The Department policy states that an applicant working and paying taxes in Australia, paying fees to an

²⁰ES at 19. The Court in *Vyas v MIMAC* [2013] FCCA 1226 found the ES to be of assistance in considering the plain words of the waiver provision such that it could not be said that it would be sufficient for the applicants to demonstrate that their circumstances were compelling or compassionate alone, but that there has to be a connection with Australia or an Australian citizen or permanent resident, or eligible New Zealand citizen, because otherwise there would be no utility in having those words in the clause (at [14]).

²¹ES at 19-20.

²²Policy –[Sch4 4020] – Public Interest Criterion 4020 – The integrity PIC - Compelling and/or compassionate circumstances –Compelling circumstances affecting the interests of Australia (re-issue date 1/1/18).

²³Policy –[Sch4 4020] – Public Interest Criterion 4020 – The integrity PIC - Compelling and/or compassionate circumstances Compelling circumstances affecting the interests of Australia (re-issue date 1/1/18).

education provider or spending money in Australia does not suffice for the PIC4020 waiver provisions.²⁴

50. It has been held that the circumstances in these types of cases must force or drive the decision-maker irresistibly to be satisfied that special consideration should be given to granting the particular application.²⁵ Whilst I commend the applicant on his academic progress and empathise with his personal circumstances (which do not involve Australian citizens, Australian permanent residents or eligible New Zealand citizens), I do not consider that his circumstances constitute compelling or compassionate circumstances within the requirements of the PIC4020 provisions set out above.
51. Having considered the applicant's case, I am not satisfied that, singly or cumulatively, there are compelling circumstances affecting Australia's interests, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that justify the grant of the visa.
52. For the above reasons, I am not satisfied that the requirements of PIC 4020(1) should be waived pursuant to PIC 4020(4).

53. **Conclusions**

54. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of clause 500.217 of Schedule 2 of the Regulations.

DECISION

55. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

56.

T. Quinn
Member

²⁴Policy –[Sch4 4020] – Public Interest Criterion 4020 – The integrity PIC - Compelling and/or compassionate circumstances Compelling circumstances affecting the interests of Australia (re-issue date 1/1/18).

²⁵*Plaintiff M64/2015 v MIBP* [2015] HCA 50.

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...